Supreme Court
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No. 02-1045

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL ANDERSEN and LORENZO J. LAMANTIA, individually and on behalf of the members of the Institute of Global Prosperity,

Petitioners,

v.

UNITED STATES OF AMERICA and NAMED and UNNAMED AGENTS of the INTERNAL REVENUE SERVICE CRIMINAL DIVISION, et al.

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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1. The government mischaracterizes the relief sought by petitioners, and then relies on that mischaracterization to support its argument. By selectively quoting from Plaintiffs' Motion For Preliminary Injunction and Temporary Restraining Order, and by omitting key, limiting words contained in that motion (Opp. 6-7), the government

contends that petitioners sought to enjoin the IRS "from conducting **any** future searches and seizures and from using the material that had already been seized.". Opp. 4, citing to Pet. 6a-7a (emphasis added). The Ninth Circuit, over the dissent of Judge Reinhardt, similarly mischaracterized the relief sought by petitioners. In fact, the petitioners' Motion for Preliminary Injunction and Temporary Restraining Order was limited to preventing the IRS from searching for and seizing indicia of association without probable cause. The verbatim language of the prayer for relief contained in Petitioners' Motion for Preliminary Injunction and Temporary Restraining Order is as follows:

> Wherefore, Plaintiffs on behalf of themselves and IGP's members and associates, pray for
>
> (1) entry of a temporary restraining order, and preliminary injunction against all defendants prohibiting defendants from: (a) conducting any further searches and seizures or otherwise seeking or acquiring **indicia of association** with plaintiffs and/or IGP's members and/or associates; and (b) any use or dissemination to any person, entity or agency whatsoever of any **membership and/or associates' identities** or information already obtained during the searches and seizures at issue described hereinabove, including the fruits derived therefrom, until and unless this Court determines that these searches and seizures were lawful and the government has demonstrated a cogent and compelling need for **indicia of association** sufficient to overcome the members' right to privacy; and

(2) a permanent injunction (a) ordering all defendants to return all **such** items and information and destruction and elimination of all **such** information no matter where or how maintained by the government or any of its agents and agencies and (b) prohibiting any further searches for or other attempts to obtain **indicia of association** with plaintiffs and IGP. [emphasis added].

2. The government and the Ninth Circuit erroneously claim that petitioners have failed the first prong of DiBella v. United States, 369 U.S. 121 (1962), in allegedly failing to show that Petitioners' Motion for Preliminary Injunction and Temporary Restraining Order is "solely for return of property." However, petitioners have never asked for suppression, and suppression is the gravamen of the first prong of DiBella. At least two circuit courts have held that the language "solely for return of property" is satisfied so long as the movant has not asked for suppression of evidence. See, e.g., United States v. Williams, 459 F.2d 909, 910-911 (6th Cir. 1972); In re 6455 SouthYosemite, 897 F.2d 1549, 1554 (10th Cir. 1990) ("Both because of the amendment to Rule 41(e) [1989] and because of appellants' representations that they do not seek suppression in this action, we conclude that it is one 'solely' for the return of property ... .") Here, petitioners have not sought suppression of evidence and therefore petitioners satisfy the first prong enunciated in DiBella.

3. Moreover, the first prong of the DiBella test is not independent of the second prong, but rather is dependent upon the existence of a criminal prosecution *in esse*. If there is no criminal prosecution *in esse*, DiBella is inapplicable. The rationale underlying the DiBella decision is that an

interlocutory appeal from the denial of a Rule 41(e) motion would interfere with the administration of justice only when there is a criminal prosecution *in esse*. If there is no criminal prosecution *in esse*, there is no action that will be interfered with by a motion brought for return of property or for injunctive relief.

4. The government admits a conflict exists between the circuits concerning whether for purposes of DiBella a grand jury investigation constitutes a criminal prosecution *in esse*. Opp. 5. The government by its silence appears to concede that the issues presented by the conflict are recurring and of great practical importance. Pet. 10-11. The government's sole argument against granting certiorari is that this is not an appropriate case to resolve the conflict. Opp. 5. The government erroneously claims that resolving the conflict in favor of petitioners would not "alter the ultimate disposition of the controversy." Opp. 6. The government is mistaken. If this Court were to resolve the conflict in petitioners' favor and hold that a grand jury investigation is not a criminal prosecution *in esse*, the district court's denial of their motion for return of property and injunctive relief would clearly be final and appealable. Accordingly, the judgment of the Ninth Circuit would be reversed and petitioners would be entitled to appellate review of the district court's decision.

5. The government argues that the third party claims of IGP members are not reviewable because "the relief they seek is not 'solely for return of property'", citing DiBella. Opp. 7. However, it is improper to raise DiBella as a bar to the appealability of the First Amendment claims of the more than 70,000 members and prospective members of IGP, as DiBella clearly is limited to cases in which there is a criminal prosecution *in esse* and even the government has never

asserted that these members or prospective members are the subject of a criminal prosecution *in esse*. The members and prospective members of IGP are therefore entitled to review of their third party claims. As this Court stated in United States v. Ryan, 402 U.S. 530, 533 (1971), in reference to DiBella : "We have thus indicated that review is available immediately of a denial of a motion for the return of seized property, where there is no criminal prosecution pending against the movant."

6. The government claims that "The holding of the court of appeals is correct, and petitioners cite no case in which any court has held otherwise." Opp. 6. This is not accurate. Petitioners rely upon the cases cited in Judge Reinhardt's dissent, including the five decisions of this Court, Pet. 15a-16a, and the Tenth Circuit's decision in United States v. P.H.E., Inc., 965 F.2d 848, 857 (10th Cir. 1992) ("Federal courts have asserted jurisdiction in a number of contexts involving non-final orders in which the proceedings complained of infringed upon First Amendment rights.") Pet. 15a. As Judge Reinhardt stated, the rule of DiBella is not absolute and allows for exceptions: "These exceptions fit within a general public policy permitting interlocutory appeals in criminal cases where rights of exceptional importance are at stake, and where resolution of those rights cannot wait until the close of criminal proceedings." Pet. 15a (citations omitted).

7. This Court's forty-five year history of upholding associational rights under the First Amendment underscores the significance of the issues raised by the instant petition. See NAACP v. Alabama, 357 U.S. 449 (1958), and Watchtower Bible and Tract Society v. Village of Stratton, 536 U.S. 150 (2002).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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